255 W. 95th St. Apt. Corp. v 732 Wea Holdings, LLC
2016 NY Slip Op 31652(U)
August 30, 2016
Supreme Court, New York County
Docket Number: 154204/2016
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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255 West 95th Street Apartment Corp.,

Plaintiff,

-against-

732 Wea Holdings, LLC

Defendant.

---X

Index No.: 154204/2016

DECISION AND ORDER
Motion Seq. 1

HON. ANIL C. SINGH:

In this action, defendant 732 Wea Holdings, LLC, ("defendant") moves pursuant to CPLR 3212 for an order granting it partial summary judgment on the plaintiff 255 West 95th St Apt Corp's ("plaintiff") first and second causes of action for a declaration that the Fourth Amendment to the Agreement of Purchase and Sale (the "PSA" or the "Agreement") is a valid and effective agreement which has not expired , and that defendant continues to have the right, but not the obligation, to close under the PSA. Plaintiff opposes the motion.

This case stems from a dispute over the enforceability of the Fourth Amendment pursuant to which plaintiff, a New York housing cooperative, agreed to sell its undeveloped air rights to defendant, a real estate development company, for $2 million. Although the parties signed the Agreement in 2008, defendant did not consummate the sale, and instead negotiated a series of one year extensions on the closing in exchange for payments to plaintiff. On September 13, 2011, the

Third Amendment to the PSA was executed. At issue here is the validity of the Fourth Amendment to the PSA.

On October 2, 2013, Traveis Perkins, who held positions on the plaintiff's Board of Directors and was also employed as property manager on behalf of Sandberg Management, the managing agent for the building, 255 West 95th St. in Manhattan signed the Fourth Amendment to the agreement extending the deadline to close on the air rights deal for an additional two and one-half years. The amendment was signed in Mr. Perkins' capacity as Assistant Secretary of the cooperative corporation.

Prior to executing the Fourth Amendment, on September 25, 2013, Mr. Perkins sent an email to defendant's counsel where he states that the Board had approved the Fourth Amendment and he would be executing it. On October 3, 2013, Mr. Perkins by email advised defendant's counsel that he did not have authority to sign the agreement and to "disregard the 4th Amendment with my signature as it is not valid".

Analysis

Standard on Motion for Summary Judgment

The standards for summary judgment are well settled. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to

judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 (1985). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion (See Id.) Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. See, Alvarez v. Propect Hosp., 68 N.Y.2d 320, 324 (1986). Moreover, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 560 (1980). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" Garcia v. J.C. Duggan, Inc., 180 A.D.2d 579, 580 (1st Dept 1992), citing Assaf v. Ropog Cab Corp., 153 A.D.2d 520, 521 (1st Dept 1989). The court's role is "issue-finding, rather than issue-determination". Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957) (internal quotations omitted).

Actual authority

An agent has "actual authority" when its actions have been expressly authorized by its principal. Standard Funding Corp. v. Lewitt, 89 N.Y.2d 546, 550

(1997). There remains an issue as to whether Mr. Perkins was expressly authorized by the plaintiff to sign the agreement.

Here, in his affidavit, the Board's president, Mr. Pennotti, states that the Board did not authorize Mr. Perkins to sign the Fourth Amendment. Furthermore, Mr. Perkins sent an email on October 3, 2013 (after signing the agreement) stating that he had no authority to sign the agreement. Accordingly, defendant's motion for summary judgment based on actual authority must be denied.

Apparent authority

Under New York law, "[a]pparent authority must be based on words or conduct of the principal, communicated to a third party, that give rise to the **appearance and belief** that the agent possesses authority to enter into a transaction; an agent cannot, though his own acts, cloak himself with apparent authority." 1230 Park Assoc., LLC v N. Source, LLC, 48 AD 3d 355, 355–56 (1st Dept 2008) citing Hallock v. State of New York, 64 N.Y.2d 224, 231 (1984) (emphasis added). In 1230 Park Assc., the court held that the part owner of the plaintiff LLC had no authority to enter into the loan transactions on plaintiff's behalf. The court held that the operating agreements at issue that governed plaintiff made clear that plaintiff's affairs could only be conducted by a majority of the vote of the operating managers and there was no majority vote. Moreover, the court held that there was no acts or statements by plaintiff that conferred such authority.

In 56 E. 87th Units Corp. v Kingsland Group, Inc., 30 A.D. 3d 1134, 1135 (1st Dept 2006), the court stated that "[i]t is axiomatic that apparent authority must be based on the actions or statements of the principal". The court held that plaintiff's president lacked apparent authority to enter into loan transactions on behalf of the plaintiff defendants although the defendants said they relied on past dealings with the president in his capacity as principal for his own business entities, which were unrelated to plaintiff. The court noted that defendant "could point to no act or word of the plaintiff [principal] that might have conferred such authority" Id. (emphasis added) Cf. Goldston v. Bandwidth Technology Corp., 52 A.D. 3d 360 (1st Dept 2008) (where the court held that there was apparent authority when a president of a corporate defendant executed a retainer agreement with a law firm; "even in the instance where a chief executive's actual authority to enter into a particular agreement without the approval of the board of directors is in doubt, no obligation is imposed on the other party to the transaction, to show that [the president] did, in fact, consult the board").

The existence of 'apparent authority' depends upon a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal—not the agent. Indosuez Intl. Fin. B.V. v Natl. Reserve Bank, 98 N.Y. 2d 238, 245–46 (2002) (accepting payments for the transaction is "implied representation" that signature of agent had authority

to bind principal). Moreover, a third party with whom the agent deals may rely on an appearance of authority only to the extent that such reliance is reasonable. Id.

On this record, defendant has failed to show that it relied on the misrepresentations of Mr. Perkins because of some misleading conduct on the part of plaintiff. Mr. Perkins was as an assistant secretary of the plaintiff's board. Prior to the dispute regarding the agreement, defendant typically sent emails to Mr. Perkins and Mr. Perkins would then inform defendant's representative of the board's decision. Moreover, on March 2011, plaintiff's counsel advised defendant to communicate with plaintiff's managing agent regarding any further amendments. There is also no dispute that Mr. Perkins did email defendant on September 25, 2013 that the board had approved the agreement and that he would execute it. Further, there was no communications between plaintiff and defendant between September 25, 2013 and October 2, 2013.

However, as in 56 E. 87th Units Corp, defendant's has not proven that these constitute actionable "misleading conduct" on the part of the principal. Notably, there remain issues of fact.

There remains an issue of fact as to the reliance by defendant on Mr. Perkins' misrepresentations. Plaintiff claims that it was ready to close by October 2, 2013 as provided by the Third Amendment to the PSA. It provides no evidence that it was ready and willing to do so. Moreover, negotiations regarding the Fourth

Amendment between plaintiff and defendant – via Mr. Perkins – occurred after the October 3, 2013 email was sent by Mr. Perkins. Importantly, there is no affidavit (or evidence) from Mr. Perkins as to what transpired after he corresponded with defendant's counsel on September 25, 2013.

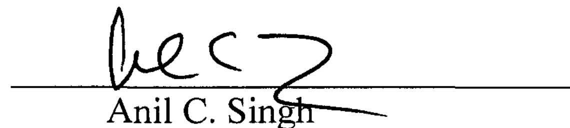
Moreover, the issue of apparent authority was inappropriately raised for the first time in defendant's reply papers. Gramercy Co. v Benenson, 223 AD2d 497, 498 (1st Dept 1996); Hakim v 65 Eighth Ave., LLC, 42 AD3d 374, 374 (1st Dept 2007).

Accordingly, by "drawing all reasonable inferences in favor of the nonmoving party", Garcia,180 A.D.2d 579, 580 (1st Dept 1992), there remains genuine issues of material fact as to whether Mr. Perkins had apparent authority to sign the Fourth Amendment to the PSA, and consequently, whether the fourth amendment is a valid and effective agreement.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment seeking a declaratory judgment with respect to the subject matter of the complaint's first and second causes of action is denied.

Date: August 30, 2016
New York, New York



Anil C. Singh